IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 32844

STATE OF IDAHO,	)	**2009 Unpublished Opinion No. 457**
	)	
Plaintiff-Respondent,	)	**Filed: May 8, 2009**
	)	
v.	)	**Stephen W. Kenyon, Clerk**
	)	
SARAH MARIE JOHNSON,	)	**THIS IS AN UNPUBLISHED**
	)	**OPINION AND SHALL NOT**
Defendant,	)	**BE CITED AS AUTHORITY**
	)	
and	)	
	)	
PAT DUNN,	)	
	)	
Real Party in Interest-Appellant,	)	
	)	
v.	)	
	)	
BLAINE COUNTY,	)	
	)	
Real Party in Interest-Respondent.	)	
	)	

Appeal from the District Court of the Fifth Judicial District, State of Idaho, Blaine County. Hon. R. Barry Wood, District Judge.

Order for payment for investigator services, affirmed.

Pat Dunn, Boise, pro se appellant.

Jimmy J. Thomas, Blaine County Prosecuting Attorney; Timothy K. Graves, Chief Deputy Prosecuting Attorney, Hailey, for respondent.

LANSING, Chief Judge

Pat Dunn appeals from the district court's decision disallowing payment from Blaine County funds for some of the services that he allegedly performed as an investigator for the defense of an indigent individual charged with murder. We find no abuse of discretion and affirm.

I.

FACTS AND PROCEDURAL BACKGROUND[1]

Sixteen-year-old Sarah Johnson was charged in the district court for Blaine County with two counts of first degree murder in the shooting deaths of her parents.[2] Because Johnson was indigent, she was entitled to the services of a public defender. At the time of Johnson's prosecution, Blaine County had not established an office of public defender but instead contracted with a number of private attorneys to provide public defender services. The district court appointed one of those attorneys, Bob Pangburn, to represent Johnson. Pangburn soon sought leave to hire an investigator at public expense, as authorized by Idaho Code § 19-852(a)(2). The district court granted the motion, authorizing compensation of no more than $50 per hour. The order did not define what investigative services were authorized nor impose limits on the investigator's time or expenses. After an initial investigator was discharged by Pangburn, Dunn was hired with court approval at $50 per hour. Dunn resided in Boise but agreed to waive compensation for travel time to and from Blaine County so as to cost the equivalent of a local investigator. Dunn began conducting investigation services in March of 2004.

Apparently to protect the defense from revelation of defense strategy through its billings, in April 2004 defense counsel and Blaine County entered into a written stipulation concerning payments by Blaine County for defense expenses. Under the stipulated procedure, the defense was to submit itemized billing statements of time and expenses for its experts and investigators to the district court for review and approval on an *ex parte* basis, and the court was to keep this documentation under seal. If it approved the time and expenses, the district court would issue payment authorization orders directing the County to pay specific amounts of money to the defense attorney, expert or investigator. The stipulation further provided that billing statements were to be submitted before the first day of every month and that the County was not waiving any right to further review of court-authorized expenses.

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[1] We have been provided with a less than complete record on appeal. We glean a significant portion of the procedural history of this case from the district court's recitations in its orders.

[2] *See State v. Johnson*, 145 Idaho 970, 188 P.3d 912 (2008).

The murder case was complex. According to the prosecutor's pretrial representations, the case investigation had generated 11,000 pages of documents, and the prosecutor intended to call 90 to 110 trial witnesses, including various experts, and intended to proffer over 200 exhibits. At varying times, the district court granted defense motions to appoint a second attorney, a DNA expert, a ballistics/blood splatter expert, two forensic medical experts, a fingerprint expert, a neuropsychologist, a criminalist, and a second investigator/sentencing mitigation expert, all at public expense.

From March 2004 through November 2004, Dunn submitted affidavits with attached itemized billing statements on a fairly regular basis, although not in strict compliance with the stipulation. The district court approved every billing request without comment or question, finding in its authorization orders that Dunn's records reflected "reasonable and necessary investigative services in this case." Blaine County paid Dunn over $62,000 for his time and expenses during this nine-month period, in which he charged an average of more than 120 hours per month.

No billings were received from Dunn for the months of December 2004, January 2005 or February 2005 until after Johnson's trial ended on March 16, 2005. On April 12, 2005, Dunn filed affidavits with attached bills for these missing three months, requesting payments for 74.8 hours of investigative services rendered in December 2004, 152.2 hours in January 2005, and 264.7 hours in February 2005. On this same day the district court apparently ordered that no further payments to either Dunn or the second defense attorney would be authorized until further hearing.[3] On April 13, 2005, the Blaine County Board of County Commissioners wrote a letter to the district court, expressing concern over billings by the "defense team" for services that, in the Board's view, were both excessive and outside the scope of allowable expenses. The district court revealed its receipt of this letter by attaching it to an April 18, 2005, sua sponte show cause order. The order directed lead attorney Pangburn to show cause why the services of the defense team, save for Pangburn, should not be terminated. On May 3, 2005, Dunn filed his last bill for investigative services rendered in March 2005 through his last day of work on April 12, 2005. It

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[3] In a later order, the district court stated that it made this order at the April 12, 2005 hearing. The record before us does not include either the order or a transcript of the April 12 hearing.

requested payment for an additional 238.2 hours of work, which included time spent attending Johnson's trial. In total, Dunn sought payment for 729.9 hours worked from December 2004 through April 12, 2005.

In July 2005, the prosecutor filed a motion asking the court to review Dunn's charges for December 2004 through April 2005. The prosecutor asserted that much of the time that Dunn spent working on the case did not fall within what could reasonably be considered investigative services. At a hearing on the motion, the district court held that certain of Dunn's bills lacked sufficient detail and that without the necessary detail the court could not determine what services were rendered, whether they were necessary, and whether the time expended was reasonable. The court therefore ordered that Dunn provide more detailed information. Dunn responded by submitting a new billing statement that reduced some of his requested hours.

The district court thereafter issued an order that specifically disavowed any statements or oral rulings it had made at the hearing, and instead addressed the matter anew. The court authorized Dunn to be paid for post-trial services as a mitigation expert, even though he had not previously been authorized to assume this role. The court also defined what it meant by "investigator" as used in its order authorizing employment of a defense investigator, and stated that to be compensable, the services had to be both necessary and a reasonable use of time. The court also said that Dunn's more definite billing statement still did not provide sufficient detail and that the court thus had "no accurate means to assess time to task." Nevertheless, rather than imposing the harsh result of disallowing all of Dunn's claims, the court allowed 238 of the requested 729.9 hours of investigative services. The court further observed that if Pangburn had instructed Dunn to provide defense services that were not investigative in nature, Dunn's claim for payment would be a private matter between him and Pangburn.

Dunn appealed from this order which disallowed more than two thirds of his claim. Dunn's appellant's brief argued that the district court had erred by not delineating the individual services it was disallowing and why. This Court agreed and temporarily remanded for the district court to clarify its reasons for the amount awarded. On remand, the district court was unable to locate its original calculations underlying its prior order and consequently "started over." The court allowed Dunn a further (third) opportunity to submit new billing statements with more detail. Dunn's third billing affidavit submitted on remand reduced his claimed hours to 677.8, eliminating some of his requests including his charge for time spent awaiting the jury

verdict, which this Court, in its remand order, described as "nothing short of outrageous." After allowing the prosecution to submit objections, the district court issued a tentative ruling, but also allowed Dunn one further chance to respond, and Dunn did so by submitting a written objection, to which he attached his fourth affidavit explaining his services. After one more hearing, the court issued its final order allowing compensation for 352.3 of the requested 677.8 hours. Among the amounts disallowed were many of Dunn's charges for being present in the courtroom throughout the month-long trial. The appellate proceedings then resumed, and this Court allowed further briefing by the parties to address the district court's order on remand. The case is now ripe for our decision.

II.
STANDARD OF REVIEW

The determination of reasonable fees to be reimbursed by a county for the defense of an indigent is a matter committed to the sound discretion of the trial court. *State v. Dallas*, 109 Idaho 670, 677, 710 P.2d 580, 587 (1985); *State v. Fisk*, 92 Idaho 675, 681, 448 P.2d 768, 774 (1968). The trial court's determination will not be overturned unless it is clearly erroneous. *Dallas*, 109 Idaho at 677, 710 P.2d at 587.

III.
ANALYSIS

A. Initial Concerns

We begin by addressing a number of preliminary issues raised by Dunn's pro se briefing to this Court. Dunn begins his argument by purporting to counter a position taken by neither the County nor the court below--that Dunn's charges should be disapproved because his bills were filed late. The district court denied none of Dunn's charges on that basis. Instead, the district court repeatedly held that it was exercising its discretion to *not* deny Dunn's claims based on their untimeliness because this would, in the court's view, be unfair to him. The district court did mention that if Dunn's claims had been submitted on a monthly basis in accord with the court's order, the misuse of much of his time could have been caught and corrected earlier. Dunn has shown no error.

Dunn also complains about the April 13, 2005 letter to the district court from the Board of County Commissioners expressing concern over billings by the "defense team" for services that, in the Board's view, were excessive and outside the scope of allowable expenses. He

asserts that the letter discloses that the Board had improper access to the district court's *ex parte* defense billing file and represents an improper attempt to influence the Court. His claim of error fails for a number of reasons. First, the *ex parte* procedure was followed to protect Johnson's right to a fair trial by not revealing defense strategy, not to protect Dunn. Second, the content of the letter does not establish that the Board gained access to the sealed court file. At a hearing, the prosecutor explained that he had told the Board of some of Dunn's activities, such as his many meetings with Johnson at the jail even after the trial, which were known to the prosecutor through his own observation or through reports from the jail. Furthermore, the defense bills ultimately were appropriately disclosed to the prosecutor after all of the criminal proceedings were concluded so the prosecutor could present the County's objections to Dunn's bills. Dunn has shown, at most, that the Board's letter was an inappropriate, but inconsequential, *ex parte* contact with the district court, which the district court promptly revealed to the defense. Even if the Board had access to the *ex parte* billings, Dunn cites no authority and makes no reasoned argument as to how that is relevant to the propriety and reasonableness of his billings, which is the issue before this Court.

Dunn next argues that the district court had orally set a deadline for the County's objections to his bills that was violated when the prosecutor filed his motion to review the bills several weeks after that deadline. Accordingly, Dunn contends, the district court should have found the County's objections to have been waived. When Dunn raised this untimeliness issue at a hearing, the district court responded that it did not "want to get into the waiver thing," because strict application of time limits would also apply to bar Dunn's claims for which timely bills were not submitted to the court. The prosecutor explained that he wanted to avoid creating a "circus atmosphere" by fighting over defense bills while Johnson was still awaiting sentencing, and therefore waited until after sentencing to file his request for review of Dunn's charges. While the district court did not expressly find that this constituted good cause for late objection, it inherently so found. Finally, and perhaps most importantly, under the procedure adopted by the parties, the district court was obligated to review the propriety of defense bills whether or not the County objected. Therefore, the timeliness of the County's objection is of little or no relevance.

B. Definitions of Investigator and Mitigation Expert

In relation to the type of services for which the court allowed compensation to Dunn, the district court defined the role of "investigator" as:

> A person skilled in witness interrogation and evidence gathering . . . who is hired to locate witnesses, gather evidence, run down leads, etc. The job duties of a skilled investigator being paid $50.00 per hour at the public expense are NOT those of a polyartist performing other generalized tasks, secretarial, paralegal, case assistant, witness handler, file clerk, errand runner, and/or general errand person.

The court also recognized that Dunn had been employed as a mitigation expert for sentencing and defined that role as "an investigator who locates and compiles evidence favorable to a defendant at sentencing."

Dunn does not directly challenge the district court's definition of investigator and mitigation expert, but does so indirectly. He cites a number of American Bar Association standards, some unique to death penalty cases and some not, and argues that it is crucial for a criminal investigator to be present throughout all court proceedings. None of the cited standards say this, however. Dunn also argues that because the prosecution used its investigator as a trial assistant, Dunn's presence throughout Johnson's trial was also necessarily investigative "in parity with the State." We disagree. The State's use of its investigator to perform any task it chooses does not transform all such tasks into investigative services.

The district court correctly held that the role of a court-appointed investigator or mitigation expert is not that of a general-purpose assistant to defense counsel. The district court also correctly held that, to be compensable, the services rendered must be a reasonable use of time. *See Hensley v. Eckerhart*, 461 U.S. 424, 433-34 (1983); *Craft Wall of Idaho, Inc. v. Stonebraker*, 108 Idaho 704, 706, 701 P.2d 324, 326 (Ct. App. 1985). We now turn to specific claims disallowed by the court and challenged by Dunn on appeal.

C. Specific Claims

Of the 80.6 hours claimed in Dunn's December 2004 bill, the district court disallowed one hour for Dunn's attendance at two criminal hearings involving Johnson's former boyfriend. The district court held that Dunn's attendance at these hearings was unnecessary and unreasonable because one of Johnson's attorneys also attended the hearing. Dunn's unadorned argument that it was "exceedingly important" for him to attend the hearings shows no abuse of the district court's discretion.

On the January 2005 bill, the district court disallowed 25.4 hours out of the 141.8 hours claimed. This included disallowance of 4.0 hours when Dunn drove to a jail to talk to Johnson, only to learn that she had been moved to the Blaine County jail to attend a scheduled hearing in Hailey. Dunn argues that the hearing had been cancelled and that the waste of time therefore was the fault of the sheriff's office. The district court held that Dunn's use of time was unreasonable because he should have called either jail before traveling. We find no abuse of discretion. The court disallowed 6.0 hours for a car trip by Dunn from Hailey to Ontario, Oregon for a meeting with one of the defense attorneys to discuss both the return of prosecution evidence that had been sent to California for defense testing and the further testing that needed to be done. The court held that the coordination of testing by other experts was not the job of an investigator. We perceive no error in this ruling. We further note that Dunn's use of time appears to be unreasonable in that nothing in Dunn's explanation of the charge indicates why this communication with attorneys could not have been done by telephone, saving the five-hour trip. Also, Dunn lived in Boise, and Ontario, Oregon is a one-hour drive from Boise. It appears that Dunn was billing for his time to get home from Hailey, something he did on numerous occasions despite his agreement not to charge for travel time between Boise and Hailey. We find no abuse of discretion.

The court disallowed 7.2 hours composed of a 5.0 hour drive from Hailey to Caldwell (again apparently in violation of his agreement) and a 2.2 hour meeting with defense experts to videotape and photograph the test firing of the murder weapon. The court held that the supervision of testing by other hired experts was not the job of an investigator. Seven and one-half hours for reviewing and organizing discovery materials and placing it into the trial books were also disallowed. The court held that this was the job of one of the attorneys and was not the job of an investigator. We find no abuse of discretion in these rulings. Dunn does not challenge the disallowance of the remaining time from the January bill.

As to the February 2005 billing, the district court rejected 153.2 hours out of the 267.7 hours claimed. The court rejected a request for 3.2 hours of travel time to a jail to meet with the defendant and .5 hours "to discuss the pending trial." The court held that this was not the job of

an investigator. We find no error.[4] The district court also disallowed the time during trial that Dunn billed for preparing and organizing witness statements, transcripts, discovery, forensic results, investigative materials, trial books, evidence lists, and witness lists; as well as time for meetings with the defendant to discuss what the day's testimony might encompass, hooking up the defense trial computer, taking notes and attending trial. The district court disallowed these claims on the basis that Dunn was no longer acting as an investigator but instead had become a trial assistant, and that much of this work was the job of attorneys or legal assistants employed by the attorneys. We find no abuse of discretion. We are unpersuaded by Dunn's arguments that he is entitled to be compensated because these tasks had to be done by "someone" and that a criminal defense investigator must necessarily be present at all times throughout the trial.

As to the March 2005 through April 12, 2005 billing, Dunn requested 225.2 hours for preparing and organizing witness statements, transcripts, discovery, forensic results, investigative materials, trial books, evidence lists, and witness lists, and for meetings with the defendant to discuss what the day's testimony might encompass, hooking up the defense trial computer, taking notes, picking up witnesses at the airport, meeting with witnesses to prepare them to testify, preparing exhibits, picking up exhibits, meetings with counsel to discuss cross-examination of witnesses and closing argument, working on objections to jury instructions, attending trial, numerous post-trial meetings with Johnson including many hours of travel time, and investigation of allegations that Johnson had been sexually assaulted while incarcerated in the Blaine County jail. The district court disallowed all but 44.8 hours holding, variously, that Dunn's descriptions of his work lacked sufficient detail, that these tasks were not the job of an investigator, that the investigation into the allegations of a sexual assault had nothing to do with the criminal trial or with sentencing, and that Dunn's use of his time was unreasonable. Dunn's arguments show no error in the district court's assessment that these were not legitimate investigative services.

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[4] We pause to briefly address Dunn's argument that it is critical for a criminal investigator to meet regularly in person with the client. Whether or not this is so, "regularly" must have some limitation. On appeal, we have not been provided with Dunn's billing records from March 2004 through November 2004; we have only his billing records from December 2004 through April 12, 2005. During this period, he met with defendant Johnson in person, often billing for travel time, thirty-four times.

The district court has approved payment to Dunn of more than $79,000 for his work over a period of thirteen and one-half months, which includes some unknown amount for expenses. He seeks over $16,000 more for that same period. It appears that Dunn did many of the disallowed tasks at the direction of the defense attorneys, who apparently did not consider whether the tasks fell within the scope of Dunn's appointment. In the end, however, it is ultimately Dunn's burden, as the party seeking direct compensation from the County, to prove that the billed services were investigatory in nature and that he used his time reasonably. With respect to the disputed hours, he has failed to do so. We find no abuse of discretion and affirm the district court's determination of compensable hours.

D. Prejudgment Interest

After this matter was remanded to the district court, Dunn filed a motion for prejudgment interest pursuant to I.C. § 28-22-104. The district court denied the motion, and Dunn claims error.

Prejudgment interest on an indebtedness may be recovered only where the damages were liquidated or readily ascertainable by mathematical process. *Ross v. Ross*, 145 Idaho 274, 276, 178 P.3d 639, 641 (Ct. App. 2007). Here, the number of compensable hours was in dispute and the amount that was owed to Dunn could not be determined until the district court made findings on the matter. In this circumstance, damages are not readily ascertainable nor liquidated. *Barber v. Honorof*, 116 Idaho 767, 770, 780 P.2d 89, 92 (1989); *Ross*, 145 Idaho at 277-78, 178 P.3d at 642-43; *Schenk v. Smith*, 117 Idaho 999, 1001, 793 P.2d 231, 233 (Ct. App. 1990). The district court therefore did not err by declining to award prejudgment interest.

E. Attorney Fees

The County requests attorney fees on appeal pursuant to I.C. § 12-121, which authorizes attorney fees in a "civil action." Idaho Rule of Civil Procedure 3(a)(1) provides that "[a] civil action is commenced by the filing of a complaint with the court, which may be denominated as a complaint, petition or application. . . ." While this proceeding is civil in nature, it is not a civil action within the meaning of section 12-121 because it did not commence with the filing of a complaint, petition or application as required by I.R.C.P. 3(a). *See Lowery v. Bd. of County Comm'rs for Ada County*, 117 Idaho 1079, 1081-82, 793 P.2d 1251, 1253-54 (1990); *University of Utah Hospital v. Bd. Of Comm'rs of Ada County*, 128 Idaho 529, 533, 915 P.2d 1387, 1391 (Ct. App. 1996). Rather, this dispute is the outgrowth of a criminal prosecution. Moreover, even

if section 12-121 were applicable, that section authorizes an award of attorney fees only if the appeal was brought or defended frivolously, unreasonably and without foundation. *See Black v. Ameritel Inns, Inc.*, 139 Idaho 511, 515, 81 P.3d 416, 420 (2003). Although Dunn does not prevail in this appeal, we cannot say that his appeal has been frivolous, unreasonable or without foundation as debatable questions were presented. Accordingly, attorney fees are not awarded.

IV.
CONCLUSION

The order of the district court for payment of compensation to Dunn for investigative services is affirmed.

Judge PERRY and Judge GUTIERREZ **CONCUR.**